Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1502

ECEE, INC., ET AL.,

*Petitioners,*

v.

FEDERAL POWER COMMISSION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, HOUSTON

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OCTOBER TERM, 1975

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ECEE, INC., ET AL.,

*Petitioners,*

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FEDERAL POWER COMMISSION,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Ecee, Inc., Pinto, Inc. and Texas Production Company ("Petitioners") petition for a writ of certiorari to review the judgment entered in this case on February 17, 1976, by the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. C) has not as yet been published. The January 31, 1975, order of the Federal Power Commission ("Commission") denying Petitioners' motions for withdrawal of certificates of public convenience and necessity and dismissing their applications

for new certificates of public convenience and necessity (App. A) and the Commission's March 24, 1975, order denying rehearing (App. B) in the proceedings below have not been published.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1976 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

## QUESTION PRESENTED

Each Petitioner applied for a certificate of public convenience and necessity covering certain sales of gas to Sea Robin Pipeline Company ("Sea Robin") from the federal domain, offshore Louisiana, under Section 2.75 of the Commission's General Policy and Interpretations, the so-called "optional procedure."[1] While the order granting Petitioners' applications was on appeal by an intervenor to the Court of Appeals for the District of Columbia Circuit, Petitioners terminated the subject contracts, entered into new contracts with Sea Robin and applied for certificates under Section 2.56[2] at the nationwide rate for new sales of gas. The question presented is whether the Commission correctly interpreted Sections 2.75 and 2.56 in holding that Petitioners could not terminate sales under the optional

[1] *Optional Procedure for Certificating New Producer Sales of Natural Gas*, 48 FPC 218, *amended* and *rehearing denied*, 48 FPC 477, *rehearing denied*, 48 FPC 1002 (1972), *John E. Moss, et al.* v. *F.P.C.*, 502 F.2d 461 (D. C. Cir. 1974), ..... U.S. ....., decided March 3, 1976, No. 74-883.

[2] 18 C.F.R. § 2.56. The successive amendments to Section 2.56 pertinent to this case made in Commission Opinion Nos. 699, 699-H and 699-I, Commission Docket No. R-389-B, are set forth in App. E, F and G, respectively.



procedure and apply for certificates covering their new contracts at the nationwide rate because a "final order" within the meaning of Section 2.75n[3] had been issued on Petitioners' applications under the optional procedure.

## REGULATIONS INVOLVED

The pertinent provisions of Sections 2.56 and 2.75 of the Commission's General Policy and Interpretations, 18 C.F.R. §§ 2.56 and 2.75, are set out in App. G and H.

## STATEMENT OF THE CASE

In October 1972, Petitioners entered into gas sales contracts ("the 1972 Contracts") with United Gas Pipe Line Company (who simultaneously assigned the contracts to Sea Robin) at a base price of 35¢ per Mcf at 15.025 psia, covering Petitioners' share of gas to be produced from certain leases in areas offshore Louisiana. Petitioners filed applications for certificates of public convenience and necessity covering the 1972 Contracts in December 1972, under Section 2.75, *i.e.*, the optional procedure, and in February 1973, as authorized under the optional procedure, commenced sales of gas to Sea Robin.

The Commission issued its order granting Petitioners' applications at the 35¢ per Mcf base price in September 1973. A petition for judicial review was promptly lodged in the District of Columbia Court of Appeals by an intervenor in the proceedings, American Public Gas Association ("APGA"),[4] challenging the validity of the Commission's rate determination and the legality *per se* of its order.

[3] 18 C.F.R. § 2.75n. App. H.

[4] *APGA* v. *F.P.C.*, appeal docketed No. 74-1020, D.C. Cir., January 4, 1974. Appeal voluntarily dismissed July 24, 1975.

Petitioners expressly retained the right in the 1972 Contracts to terminate them at any time prior to the issuance by the Commission of final, *nonappealable* certificates covering sales under the 1972 Contracts. In June 1974, the Commission issued Opinion No. 699, establishing a uniform nationwide base rate for interstate sales of gas at 42¢ per Mcf at 14.73 psia. Since Petitioners' sales to Sea Robin commenced after January 1, 1973, *i.e.*, February 21, 1973, the sales were eligible for the nationwide rate under Section 2.56, as amended by Opinion No. 699.[5] Therefore, in November 1974, Petitioners terminated the 1972 Contracts and entered into new contracts with Sea Robin ("the 1974 Contracts") at the nationwide rate. On November 27, 1974, Petitoners filed (i) motions to withdraw their previous applications for certificates under the optional procedure and (ii) applications for certificates covering the 1974 Contracts under Section 2.56 at the nationwide rate. The Commission made no determination on Petitioners' motions and applications until January 31, 1975.

Meanwhile, the Commission issued Opinion Nos. 699-H and 699-I on December 4, 1974, and January 7, 1975, respectively, further amending Section 2.56.[6] Under Opinion No. 699-H, sales of gas which commenced after January 1, 1973, were still eligible for the nationwide rate (now increased to 50¢ per Mcf), but only if no certificate for the subject sale had been issued under the optional procedure. Opinion No. 699-I added the further condition that producers who had *applied* for certificates under the optional procedure for sales commenced after January 1, 1973, at an average contract price lower than the nationwide rate, were ineligible for the nationwide rate as to such sales regardless of whether or not a certificate had been issued. On January

[5] App. E.

[6] App. F and App. G.



31, 1975, the Commission issued an order denying Petitioners' motions to withdraw their previous applications under the optional procedure and dismissing their applications for certificates covering the 1974 Contracts at the nationwide rate.

The Court of Appeals for the Fifth Circuit affirmed the Commission's order.

## REASONS FOR GRANTING THE WRIT

Section 2.75n reserves to producers applying for certificates under the optional procedure the right to terminate deliveries under their contracts "... if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a *final order* upon review of such application ..." (Emphasis added). This important right reserved to producers should not be neutralized by the interpretation the Commission and the Court of Appeals have placed on the words "final order" in this case.

Certainty of contract rights, including price provisions, is as important to Petitioners as it is to other producers of natural gas. Petitioners carefully retained the right to terminate the 1972 Contracts at any time prior to the issuance of final, *nonappealable* certificates by the Commission and believed that Section 2.75n clearly afforded them the right to cease deliveries of gas to Sea Robin upon exercising such right. In denying Petitioners this right, however, the Commission held in the proceedings below that "final order" in Section 2.75n means merely an order that is not interlocutory, *i.e.*, an order ripe for judicial review. The words "final order" may certainly have this sense in other contexts, as illustrated in the cases and authorities cited by the Court of Appeals below, but they surely have the opposite, and more ordinary meaning of an order determining rights and issues with finality, in Section 2.75n.

This interpretation is made manifest in Section 2.75n(2) which provides that an applicant may terminate deliveries "... upon the issuance of a certificate containing conditions unacceptable ..." to him. The court proceedings initiated by APGA's petition for review *supra,* n. 4, might well have resulted in either a holding that the Commission was without authority to issue certificates pursuant to the optional certificate procedure or a remand to the Commission for further price proceedings and the subsequent issuance of certificates conditioned in a manner unacceptable to Petitioners. Had either of these contingencies occurred, Petitioners clearly would have had the right to terminate deliveries under Section 2.75n. Thus, under the interpretation of the words "final order" adopted by the Commission, Petitioners would have had the right to terminate deliveries of gas at any time prior to the issuance of an order by the Commission granting Petitioners' applications, at which time, however, that right would become "suspended," only to revive later if the case were remanded or the Commission's order otherwise overturned by the Court of Appeals.

It is eminently more reasonable to assume that the words "final order" in Section 2.75n are used in the ordinary sense of an order *finally determining* the rights and duties of the applicant as established in the certificate granted. Only when an order becomes final in this sense may the applicant know that a valid certificate has been issued and what conditions the certificate will ultimately contain. No order can be final in this sense while it is the subject of a pending judicial review.

If Petitioners' interpretation is correct, Petitioners' right to apply for the nationwide rate as to the 1974 Contracts under Section 2.56, as amenedd by Opinion No. 699-I, is clear. Petitioners' sales are "new" sales, having commenced after January 1, 1973, and are made pursuant to contracts entered into after January 1, 1973. Not only does this produce a more reasonable interpretation of Section 2.75n, and a more rational interplay between it and Section 2.56, it produces a more equitable result in this case.



The Court of Appeals addressed the question of "fairness" to Petitioners. Petitioners were offered the optional procedure as an alternative to the chaotic area rate proceedings[7] and the grossly unrealistic prices engendered by those proceedings. Having filed their application under the optional procedure, and without any certainty as to the final outcome pending the APGA appeal, Petitioners witnessed the establishment by the Commission of the comparatively enlightened nationwide base rate structure. Petitioners exercised their contractual right to terminate the 1972 Contracts and their apparent right to terminate deliveries under Section 2.75n, only to find the Commission arguing that they had elected the benefits of the optional procedure and should not escape its burdens.

The "benefits" to Petitioners are that they are being required to sell gas under terminated contracts at a price approximately 60% less than the nationwide rate found to be just and reasonable by the Commission for comparable sales. In contrast, Petitioners' co-owners of the leasehold interests in question, Exxon Company, Mobil Oil Company,

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[7] "It should be made clear that the optional procedure is not intended to supersede the procedures currently being followed in the *area rate proceedings.* The *area rate* opinions have established rate levels for new and flowing gas sales that are currently being made, and parties may continue to operate under these procedures. This is an alternative procedure which is available if the producer is willing to forego certain benefits of *area rate proceedings,* in exchange for *certainty* of its certificated price, as determined at the certificate stage." Order No. 455, issued August 3, 1972, promulgating the optional procedure. (Mimeo. p. 11) (Emphasis added)

Pennzoil Offshore Gas Operators, Inc. and Mesa Petroleum Company are all receiving in excess of 50¢ per Mcf for gas produced from the same wells as Petitioners' gas. This result is neither equitable nor necessary under Sections 2.75n and 2.56, and is in derogation of the public interest.

These Petitioners are relatively small independent producers who must primarily base their exploration and development efforts on internally generated funds. The action below of both the Commission and the Court of Appeals, in choosing to ignore the lack of finality of Petitioners' optional certificates, necessarily also ignores the need for higher prices to provide those funds necessary for efforts to help alleviate this nation's critical shortage of natural gas supply.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 15, 1976

*Of Counsel:*

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Petition on the Respondent, Federal Power Commission, by depositing same in the United States mail, postage prepaid, addressed to counsel of record for the said Commission. I have also served a copy of said Petition on the Solicitor General, Department of Justice, by depositing a copy in the United States mail, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

/s/ WILLIAM NEAL POWERS, JR.
William Neal Powers, Jr.

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Appendix C — Opinion of the United States Court of Appeals for the Fifth Circuit, Ecee, Inc., et al. v. Federal Power Commission No. 75-2327 (Feb. 17, 1976).

Appendix D — Judgment of the United States Court of Appeals for the Fifth Circuit, Ecee, Inc., et al. v. Federal Power Commission, No. 75-2327 (Feb. 17, 1976).

Appendix E — Section 2.56 of the Commission's General Policy and Interpretations (18 C.F.R. § 2.56) as amended by the Commission's Opinion No. 699.

Appendix F — Section 2.56 of the Commission's General Policy and Interpretations (18 C.F.R. § 2.56) as amended by the Commission's Opinion No. 699-H.

Appendix G — Section 2.56 of the Commission's General Policy and Interpretations (18 C.F.R. § 2.56) as amended by the Commission's Opinion No. 699-I.

Appendix H — Section 2.75n of the Commission's General Policy and Interpretations (18 C.F.R. § 2.75n).

# APPENDIX A

A-1

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

*Before Commissioners:* John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

| | Docket Nos. |
|---|---|
| Ecee, Inc. | CI73-456, CI75-351 |
| Pinto, Inc. | CI73-455, CI75-349 |
| Texas Production Company | CI73-454, CI75-350 |

**ORDER DENYING MOTIONS FOR WITHDRAWAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND DISMISSING APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY**

(Issued January 31, 1975)

On December 26, 1972, Ecee, Inc., Pinto, Inc., and Texas Production Company filed applications for certificates of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act and Section 2.75 of the Commission's General Policy And Interpretations.[1]

After a hearing in these consolidated proceedings, the Presiding Administrative Law Judge, Martin E. Rendel-

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[1] *Optional Procedure For Certificating New Producer Sales Of Natural Gas,* 48 FPC 218, *amended* and *rehearing denied,* 48 FPC 477, *rehearing denied,* 48 FPC 1002 (1972), *affirmed* in part *John E. Moss, et al.* v. *F.P.C.,* Nos. 72-1837, *et al.,* D.C. Cir., August 15, 1974 (Reversed as to pregranted abandonment, Section 2.75(e)).

man on August 10, 1973, in Docket Nos. CI73-456, CI73-455, and CI73-454 issued an initial decision authorizing the issuance of a certificate of public

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convenience and necessity to each applicant to sell natural gas in interstate commerce to Sea Robin Pipeline Company (Sea Robin) at an initial rate of 35.0 cents per Mcf at 15.025 psia, subject to Btu adjustment, together with the construction and operation of any facilities subject to the jurisdiction of this Commission necessary therefor, and authorizing fixed escalations, as applied for, in the amount of 2.5 cents per Mcf every 36 months for twenty years. On September 14, 1973, the Commission issued an order which affirmed and adopted the findings and orders of the Administrative Law Judge issuing said certificates.

The American Public Gas Association (APGA) on October 15, 1973, filed an application for rehearing of the Commission's order of September 14, 1973. On November 8, 1973, the Commission issued an order denying APGA's application for rehearing.

On November 27, 1974, the applicants in Docket Nos. CI73-456, CI73-455 and CI73-454, respectively, filed motions for withdrawal of their certificates of public convenience and necessity pursuant to Section 2.75 contending that they have not been issued certificates of public convenience and necessity in the above dockets by a final order of the Commission. Each applicant in its motion cites a provision of the 1972 contract with Sea Robin as authority for cancellation of that contract prior to issuance of a final order by the Commission. Concurrently therewith, each



applicant asserted that its subject sale qualified for the new national rate pursuant to Opinion No. 699 and filed applications in Docket Nos. CI75-351, CI75-349 and CI75-350, respectively, for certificates of public convenience and necessity under Section 2.56(h) of the Commission's General Policy and Interpretations.

Applicants' assertion that the Commission has not issued a final order granting certificates of public convenience and necessity is unfounded and erroneous. Each applicant commenced deliveries of gas to Sea Robin under the 1972 contract on February 21, 1973, and they have now continued without interruption at the contract price for almost two years. The Administrative Law Judge's initial decision of August 10, 1973, granted each

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applicant a certificate of public convenience and necessity as applied for, and the Commission's order of September 14, 1973, adopting and affirming his findings and orders made them effective and final. By this order we determined that the rate was just and reasonable and no further action on these applications remained to be taken by the Commission.

Order No. 455 provides for termination of deliveries if commenced only "(1)if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected."[2] We have reviewed each application and the Presiding Administrative Law Judge's decision issuing certificates of public convenience and necessity as applied for, and our

[2] *Id.*, p. 235.

order of September 14, 1973 clearly constituted a final order for each application as contemplated by Order No. 455.

Rehearing of the Commission's order of September 14, 1973, did not lie unless that order was a final one[3] and no court review of any order of the Commission is allowed under the Natural Gas Act unless that person has made an application to the Commission for a rehearing.[4] Therefore, APGA's application for rehearing and present pending appeal[5] of the Commission's order of September 14, 1973, which issued certificates of public convenience and necessity to the applicants, do not affect its finality. A petition for court review does not operate as a stay of the Commission's order unless specifically ordered by the Court.[6]

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Furthermore, on January 7, 1975, the Commission issued Opinion No. 699-I, which clarifies the holding in Opinion No. 699-H as to the right of a producer to receive the nationwide rate after having applied for a certificate of public convenience and necessity pursuant to the optional procedure. In Opinion No. 699-I we stated:

> "Where the average price and escalations provided for in the contract filed pursuant to the optional procedure are equal to or greater than the average price determined pursuant to the national rate regulations without regard for any price increases which might result from the biennial review of the national rate

[3] 18 C.F.R. § 1.34(a).
[4] 52 Stat. 831, 15 U.S.C. § 717r(a) (1938).
[5] APGA v. F.P.C., *appeal docketed,* No. 74-1020, D.C. Cir., January 4, 1974.
[6] 52 Stat. 831, 15 U.S.C. § 717r(c) (1938).



> pursuant to Section 2.56a(n), the Commission will determine whether to allow the producer the just and reasonable rate under the national rate structure, *provided no certificate for the subject sale has been issued pursuant to Section 2.75.*" (emphasis supplied)[7]

The average price and escalations as provided in Ecee's, Pinto's and Texas Production Company's 1972 contracts with Sea Robin is clearly less than the average price determined pursuant to the national rate regulations[8] and, therefore the applicants would not be entitled to the nationwide rate even assuming the sale had not been previously certificated. However, we reiterate that Ecee, Inc., Pinto, Inc., and Texas Production Company were each issued certificates for the subject sale by our final order of September 14, 1973, and each has made continuous deliveries of gas under its certificate.

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Ecee, Inc., Pinto, Inc., and Texas Production Company have "taken and enjoyed benefits of the optional procedure and may not [now] renounce the burdens of Order No. 455."[9]

[7] ..... FPC ....., (January 7, 1975).

[8]

| | CONTRACT | OPINION NO. 699-H |
|---|---|---|
| Initial Rate ..... | 35¢ at 15.025 psia | 50.0¢ at 14.73 psia |
| Average Escalation ..... | 7.125¢ | 9.5¢ |
| Average Rate .... | 42.125¢ at 15.025 psia | 59.5¢ at 14.73 psia<br>60.69¢ at 15.025 psia |

[9] Texas Gas Exploration Corporation, ..... FPC ..... at ....., Opinion No. 706 at 6.

*The Commission finds:*

(1) The motions filed in the above dockets present no facts or legal principles which would permit withdrawal of applicants' certificates of public convenience and necessity issued under Section 2.75, and, therefore, Commission consideration of the applications for certificates of public convenience and necessity under Section 2.56(h) for the same subject sale is not warranted.

*The Commission orders:*

(1) The motions filed by Ecee, Inc., Pinto, Inc., and Texas Production Company in Docket Nos. CI73-456, CI73-455, and CI75-45 (sic), respectively, for withdrawal of their certificates issued in the above dockets pursuant to Section 2.75 of the Commission's General Policy And Interpretations are denied.

(2) The applications filed by Ecee, Inc., Pinto, Inc., and Texas Production Company in Docket Nos. CI75-351, CI75-349, and CI75-350, respectively, for certificates of public convenience and necessity pursuant to Section 2.56(h) are dismissed.

By the Commission.

(Seal)

Kenneth F. Plumb,

Secretary

## APPENDIX B

B-1

[793]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

*Before Commissioners:* John N. Nassikas, Chairman;
William L. Springer, and
Don S. Smith.

| | Docket Nos. |
|---|---|
| Ecee, Inc. | CI73-456, CI75-351 |
| Pinto, Inc. | CI73-455, CI75-349 |
| Texas Production Company | CI73-454, CI75-350 |

## ORDER DENYING REHEARING

(Issued March 24, 1975)

Ecee, Inc., Pinto, Inc. and Texas Production Company on February 28, 1975, have applied for rehearing and reconsideration of the Commission's order of January 31, 1975. In this order the Commission denied motions by the three applicants for withdrawal of certificates of public convenience and necessity issued under the Optional Procedure, Section 2.75 of the Commission's Regulations. On September 14, 1973, (50 FPC 727) the Commission issued an order affirming an initial decision of an Administrative Law Judge authorizing the issuance of a certificate to each applicant to sell natural gas in interstate commerce to Sea Robin Pipeline Co. at an initial rate of 35.0 cents at 15.025 psia, subject to Btu adjustment, for sales of gas from wells commenced after April 6, 1972, with fixed escalations as applied for the amount of 2.5 cents per Mcf every 36 months for twenty years. The Commission stated that each applicant commenced deliveries to Sea Robin

under the 1972 contract on February 21, 1973, and they have now continued without interruption at the contract price for almost two years.

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The Commission quoted Opinion No. 699-I[1] as holding that, under certain conditions, it could allow the producer the just and reasonable rate under the national rate structure provided no certificate for the sale had been issued under the optional procedure. The Commission found that the average price and escalations provided in the contracts with Sea Robin were less than the average price determined under the national rate regulations so that the applicants would not be entitled to the nationwide rate even assuming the sale had not been previously certificated.

In their application for rehearing the applicants contend that their certificates are not final because of pending court review proceedings brought by the American Public Gas Association.[2] We concluded that by adopting and affirming the Administrative Law Judge's decision we made the certificates final, and that no further action remained to be taken by us. As said in *Blanco Oil Co.* v. *F.P.C.*, "the touchstone of finality is suitability of judicial review."

The applicants say that they were not given a choice between the optional procedure and the national rate which was not promulgated until the issuance of Opinion No. 699 on June 21, 1974, ..... FPC ..... When the optional procedure was first established by Order No. 455, on August 3, 1972, (48 FPC 218) it was offered as an alternative to

[1] *Just and Reasonable National Rates*, ..... FPC ....., Opinion No. 699-I, Docket No. R-389-B, issued January 7, 1975.

[2] *American Public Gas Association* v. *F.P.C.*, D.C. Cir. No. 74-1020.



the area rates. The optional procedure permitted consideration of an application even though the contract rate was in excess of an area ceiling price. The applicant must waive all rights to seek future rate increases, other than price escalations under its contract, and must waive rights to contingent adjustment of flowing gas rates under area-rate decisions. We do not think it inequitable

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that applicants be required to adhere to the optional procedure even though area rates are increased by the establishment of a national rate or otherwise. Therefore we said in Opinion No. 699-I:

> "In providing that producers who had filed for certificates pursuant to the optional procedure could receive the national rate, we did not intend that those producers would be permitted to receive the national rate where such rate is more beneficial to the producer than the rate which was sought under the optional procedural and where deliveries have commenced pursuant to the optional procedure. That is the holding of the *Texas Gas Exploration Corporation*[5] case and Opinion No. 699-H does not reverse that holding.

[5] Docket No. CI73-681, Opinion No. 706, ..... F.P.C. ....., (September 17, 1974); Opinion No. 706A, ..... F.P.C. ..... (Nov. 13, 1974).

The *Texas Gas* case is in point. There Texas Gas filed an application for a certificate under the optional procedure on April 10, 1973, and deliveries commenced on April 13, 1973. An initial decision was issued October 26, 1973, and at the time of the Commission's decision the case was before the Commission on exceptions. The Commission refused to let Texas Gas withdraw pointing out that it had received

the benefit of selling gas above the ceiling price for eleven months and may not renounce the burdens. Here the proceedings have gone as far as a final Commission decision. As in *Texas Gas*, we shall not permit the applicant to withdraw so that they can refile under the higher nationwide rates.

*The Commission further finds:*

The assignments of error and grounds for rehearing set forth in the application for rehearing and reconsideration filed by Ecee, Pinto and Texas Production in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's order issued January 31, 1975, subject to the above discussion.

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*The Commission orders:*

The application for rehearing and reconsideration filed by Ecee, Pinto and Texas Production on February 28, 1975, is denied.

By the Commission.

(SEAL)

Kenneth F. Plumb
Secretary

## APPENDIX C

C-1

[1902]

ECEE, INC., ET AL.,

*Petitioners,*

v.

FEDERAL POWER COMMISSION,

*Respondent.*

No. 75-2327.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Feb. 17, 1976.

Natural gas producers filed petition seeking review of Federal Power Commission order denying their motions to withdraw their applications for certificates of public convenience and necessity previously filed under section 2.75 of the Commission's general policy and interpretations, and to substitute in lieu thereof new applications at the nationwide rate under section 2.56. The Court of Appeals, Coleman, Circuit Judge, held that (1) the FPC order issuing certificates under section 2.75, the rule provision relating to an optional procedure for certifying new producer sales of natural gas, was final, and (2) the FPC opinion precluding employment by petitioner of the national rate structure was neither arbitrary nor unjust nor an abuse of discretion; having previously chosen the higher optional rate in preference to the then existing area rate, petitioners were bound by their choice.

Affirmed.

**1. Administrative Law and Procedure — 704**

Final orders are not limited to the last order in a proceeding, but to be final an order must impose an obligation,

deny a right, or fix some legal relationship as a consummation of the administrative process.

**2. Gas — 6**

Federal Power Commission order issuing certificates of public convenience and necessity to gas producers under section 2.75 of the Commission's general policy and interpretations, pertaining to an optional procedure for certificating new producer sales of natural gas, was final despite third party's petition for review, as the order, which adopted the administrative law judge's findings and issued the certificates, finally sanctioned and established a legal relationship among the producers, buyer, and the FPC, and as the administrative petition was ripe for judicial review.

**3. Administrative Law and Procedure — 704**
Courts — 405(12)

A complete resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final unless and until it is stayed, modified, or reversed.

**4. Gas — 14.5(5)**

Absent a stay, orders of the Federal Power Commission are entitled to have administrative operation and effect during the disposition of review proceedings. Natural Gas Act, § 19(c), 15 U.S.C.A. § 717r(c).

**5. Gas — 6**

Certificates of public convenience and necessity issued to natural gas producers by the Federal Power Commission



under section 2.75 of its general policy and interpretations, pertaining to an optional procedure for certificating new producer sales of natural gas, were "accepted" when they were issued, without condition or modification, exactly as the parties requested.

**6. Gas — 14.1(3)**

Since the issuance of certificates of public convenience and necessity by the

[1903]

Federal Power Commission to natural gas producers, in accordance with their applications filed under section 2.75 of the Commission's general policy and interpretations, was final in September of 1973, the contractual provision permitting termination prior to that event was inoperative when termination was attempted in November of 1974, and the national rate was unavailable to the producers.

**7. Gas — 14.1(1)**

A producer of natural gas may benefit by the area rate structure or the national structure, but not both.

**8. Gas — 6**

In determining whether to grant a certificate of public convenience and necessity permitting a producer to sell natural gas in interstate commerce, benefit to the producer is certainly not the Federal Power Commission's only consideration; public interest is always involved and the FPC, as its guardian, must determine in every proceeding whether the certificate applied for is in the public interest or whether that interest calls for some other disposition.

**9. Gas — 14.3(4)**

As petitioner gas producers, who in December of 1972 filed applications for certificates of public convenience and necessity permitting them to sell natural gas in interstate commerce, set a 35¢ per MCF figure themselves, as they sought approval thereof from the Federal Power Commission, as they obtained approval, in final form, and as they operated under it for two years, the fact that a higher price, to wit, an increase in the national rate, subsequently became available did not entitle petitioners to erase all that had gone on before, and the FPC thus acted within its authority in denying petitioners' applications to substitute new applications at the nationwide rate under section 2.56 of the Commission's general policy and interpretations.

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Petition for Review of an Order of the Federal Power Commission.

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge.

The petitioning natural gas producers seek review of Federal Power Commission denial of their motions to withdraw their applications for certificates of public convenience and necessity previously filed under § 2.75 of the Commission's General Policy and Interpretations,[1] and to

[1] 18 C.F.R. § 2.75. Optional Procedure for Certificating New Producer Sales of Natural Gas. FPC Order No. 455, issued August 3, 1972, established § 2.75 to permit sales of natural gas from wells commenced on or after April 6, 1972, at a "just and reasonable" rate which "may be in excess of an area ceiling rate established in a prior opinion or order. . . ." The procedure, save one portion which is inapposite here, was sustained in *Moss* v. *FPC*, 1974, 164 U.S.App.D.C. 1, 502 F.2d 461. Certiorari was granted as to the issue with which we are not now concerned.



substitute in lieu thereof new applications at the nationwide rate under § 2.56.[2]

**[1904]**

The Commission order issuing the certificates under § 2.75 was, we find, final. The opinion precluding employment of the national rate structure was neither arbitrary nor unjust, nor an abuse of discretion. Having chosen the higher optional rate in preference to the then existing area rate, Petitioners are bound by their choice.

The orders of the Commission are affirmed.

*Facts of the Case*

The events leading to the petition for review were as follows:

(1) December 26, 1972. Petitioners filed applications for certificates of public convenience and necessity permitting them to sell natural gas in interstate commerce. Section 2.75 was invoked to permit sales to Sea Robin Pipeline Company from offshore Louisiana at 35.0 cents per Mcf for a period of 20 years with price escalations of 2.5

[2] 18 C.F.R. § 2.56. FPC Opinion No. 699, issued June 21, 1974, amended § 2.56 to make the initial uniform national rate of 42 cents per Mcf applicable to interstate sales from wells commenced on or after January 1, 1973, and sales made pursuant to contracts executed on or after January 1, 1973, for gas not previously sold in interstate commerce. The new national rate structure which replaced area rates was affirmed in National Rate Cases for New Gas (*Shell Oil Co.* v. *FPC*), 5 Cir. 1975, 520 F.2d 1061.

cents per Mcf every 36 months after the date of initial delivery.

Once an application under the optional procedure was made, deliveries could commence prior to a Commission decision on the application, but for the first six months the rate could be no higher than the prevailing area rate. If the Commission had not made a decision within that time, the rate could be raised to the contract price until the Commission entered a final order, without being subject to refund. Section 2.75(n) permitted termination of deliveries so commenced.

> (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected.

(2) February 21, 1973. Pursuant to these procedures deliveries commenced at the area rate of 26 cents per Mcf.

(3) August 10, 1973. Following a hearing on the applications, the Administrative Law Judge entered an initial decision authorizing the issuance of the certificates in the form sought. In evaluating the costs and rate of return, the ALJ relied upon the Commission's preference for employment of the concept of national industry costs, rather than those of the individual company, as established in FPC Opinion 659, Belco Petroleum Corp., issued May 30, 1973. Based upon estimated 1971 costs for finding and producing gas and applying what it believed to be a reasonable 15 percent return, *Belco* found 45 cents per Mcf to be a just and reasonable rate for offshore Louisiana gas. Noting that the 35 cent figure in the instant contracts was the low-



est cost supply source available to Sea Robin and was more than 25 percent below what the FPC considered reasonable for the same area, the ALJ saw no reason for objecting to the requested rate.

(4) August 21, 1973. Six months after the deliveries had commenced and no final order having been issued by the Commission, Petitioners began collecting the contract rate of 35 cents per Mcf.

(5) September 14, 1973. The FPC entered an order affirming and adopting the decision of the ALJ and issued the certificates.

(6) November 8, 1973. The Commission denied rehearing applied for by the American Public Gas Association (APGA).

(7) January 4, 1974. APGA filed a petition for review in the Court of Appeals.

(8) June 21, 1974. The Commission adopted a national rate structure aimed



at replacing area proceedings. The national rate was set at 42.0 cents per Mcf. Opinion No. 699.[3]

(9) November 12, 1974. The producers, relying on a contractual provision authorizing cancellation of the contract prior to issuance of a final order by the Commission, terminated the 1972 agreement with Sea Robin and entered a new contract at the national rate level. The termination was not to be effective and deliveries were to continue under

[3] The national rate was increased to 50.0 cents per Mcf on December 4, 1974, by FPC Opinion No. 699-H.

the 1972 contract until the FPC issued a certificate covering the 1974 agreement. Petitioners maintained that this was permissible since the Commission's 1973 order issuing the certificates was not "final" because APGA had a petition pending for review.

(10) November 27, 1974. Fifteen months after they had been collecting the higher contract rate and fourteen months after certification, Petitioners filed motions to withdraw from their certificates and submitted new applications for sales at the national rate level. The producers requested, however, that the withdrawal be contingent upon the issuance of certificates at the higher level.

(11) January 31, 1975. The Commission denied the motions to withdraw and dismissed the applications for certificates at the national rate. The FPC, noting the Natural Gas Act provision that a petition for review does not stay the effect of an order unless "specifically ordered by the court", 15 U.S.C. § 717r(c), determined that the petition for review did not affect the finality of its order. It also observed that the sought after judicial review had not affected the deliveries or collection of the contract rate.

Further, Opinion No. 699-I, adopted January 7, 1975, was held to be dispositive in denying the national rate to Petitioners. The decision, in setting eligibility standards, provides:

> Where the average price and escalations provided for in the contract filed pursuant to the optional procedure are equal to or greater than the average price determined pursuant to the national rate regulations without regard for any price increases which might result from the biennial review of the national rate pursuant to Section 2.56(n), the Commission will determine whether to allow the just and reasonable rate under the national rate structure, *provided no certificate for the subject sale has been issued pursuant to Section 2.75.* (Emphasis added.)



Thus, issuance of the certificates made the producers ineligible for the rate. Moreover, even if the certificates had not been issued, the fact that the average contract price and escalations were lower than the average national price disqualified Petitioners.[4]

(12) February 28, 1975. A rehearing was sought, raising the additional claim that denial of the opportunity to collect the nationwide rate was unfair and inequitable.

Petitioners maintained that they chose the optional procedure in preference to area rates prior to adoption of national rate procedure, and should be allowed to choose the latter. In denying the rehearing, the Commission responded that for two years Petitioners had had the advantage of selling gas at a price

[1906]

some 35 percent above the area ceiling. The FPC saw nothing inequitable in not permitting a switch just because the area ceiling had been effectively increased by the national rate; although Petitioners might find the higher figure attractive, there would be no corresponding benefit to the public to offset the increased prices.

(13) July 27, 1975. APGA voluntarily dismissed its petition for review.

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[4] Contract average of 42.125 cents at 15.025 psia as opposed to the national average of 60.69 cents at 15.025 psia.

(14) May 22, 1975. The producers filed this petition for review.

*Finality of the Order*

**[1]** Final orders are not limited to the last order in a proceeding, but *to be final* an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process". *Chicago & Southern Airlines* v. *Waterman Steamship Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948). *See also Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942); *Bethesda-Chevy Chase Broadcasters Inc.* v. *FCC,* 1967, 128 U.S.App.D.C. 185, 385 F.2d 967, 968.

**[2]** The order of the Commission adopting the findings of the Administrative Law Judge and issuing the certificates finally sanctioned and established the legal relationships among the Petitioners, Sea Robin, and the FPC. The order would not have been reviewable by the Court of Appeals under the terms of the Natural Gas Act had it not done so. 15 U.S.C § 717r(b). The fact that the decision was ripe for judicial review was the "touchstone of finality". *Blanco Oil Co.* v. *FPC,* 1973, 158 U.S.App.D.C. 257, 485 F.2d 1036, 1038.

**[3, 4]** A *complete* resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final *unless and until* it is stayed, modified, or reversed. This basic concept is further bolstered by the unequivocal language of § 717r(c) of the Natural Gas Act that "the commencement of proceedings [for review] . . . shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". In the absence of a stay, the FPC's orders are entitled to have



administrative operation and effect during the disposition of the proceedings. *Jupiter Corp.* v. *FPC,* 1969, 137 U.S. App.D.C. 295, 424 F.2d 783, 791.

We must interpret the word "final" as the parties must have understood it at the time they entered into the agreement *within the framework of the Natural Gas Act. Mitchell Energy Corp.* v. *FPC,* 5 Cir. 1975, 519 F.2d 36, 41; *Texas Eastern Transmission Corp.* v. *FPC,* 5 Cir. 1962, 306 F.2d 345, 347. The previously noted provisions of the Act all lead to the inescapable conclusion that Congress intended and the parties must have understood the Commission's action to be its final disposition of the matter.

If there was ever any doubt, the FPC's interpretation and policies, to which we may resort,[5] are even clearer. For example, § 2.75 itself provides in part:

> 1. A final order of this Commission issuing a certificate as applied for, or issuing a conditioned certificate acceptable to the applicants, shall consti-

[1907]

> tute a final determination that the rates, charges and services are just, reasonable and required by the present and future public convenience and necessity.
>
> n. . . . . If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed . . ., deliveries thereunder shall be terminated . . .

[5] *Hodgson* v. *Mauldin,* N.D.Ala.1972, 344 F.Supp. 302, 307, *aff'd,* 5 Cir. 1973, 478 F.2d 702.

> o. . . . [D]eliveries will be made at rates no higher than the prevailing area ceiling rate and shall so continue for six months unless the Commission has made its final orders . . .; at the end of such six-month period (if the Commission has not made its final order), the seller . . . shall be entitled to receive . . . the rates specified in the contract, and such contract rates shall continue . . . until the Commission enters its final order on the certificate application.

Petitioners further claim that they had not yet accepted the certificates because the Court, upon hearing APGA's allegations, might have ordered the Commission to refuse certification of the sales or to attach conditions unacceptable to the contracting parties. Had this occurred the sales would have terminated. *See Public Serv. Comm'n of State of N.Y.* v. *FPC*, 1972, 149 U.S.App.D.C. 421, 463 F.2d 824, 829-30; 18 C.F.R. § 2.75(n). Therein lay Petitioners' remedy if the appellate disposition of the case was contrary to the Commission's final order.

**[5]** It is obvious to us that the certificates were "accepted" when they were issued, without condition or modification, *exactly as the parties requested.* The producers sought no rehearing or alteration; rather, they proceeded for the next fourteen months to sell gas above the area rate *under the authority* of the certificates which they now seek to attack.

*Effect of Finality*

**[6]** Since the issuance of certificates was final in September, 1973, the contractual provision permitting termination prior to that event was inoperative when termination was attempted in November, 1974. The original contract



as entered into in 1972 stands. Thus, Petitioners were not entitled to the national rate as originally promulgated, and certainly not as it was construed by later opinions. The FPC's original Opinion 699, June 21, 1974, made the nationwide rate applicable to interstate sales from wells commenced on or after January 1, 1973, and to sales made pursuant to contracts executed on or after January 1, 1973, for gas not previously sold in interstate commerce. Petitioners' contract was entered into in 1972.

Subsequent Opinion 699-I, January 7, 1975, (quoted in the factual recitation) is even more direct. When a certificate has been issued pursuant to § 2.75, the national rate is not available.

*Equity of the Restriction*

Petitioners claim that binding them to the certificates as issued is unfair because they never had the opportunity to choose the national rate structure. This argument begs the question. The producers sought and received a price for their gas under the optional procedure some 35 percent above the area rate they would otherwise have been required to accept. They collected the higher rate for almost a year before the nationwide schedule was promulgated.

Obviously there are differences between the national structure and the



area procedure other than a quantum increase in price, but price is the real issue in this case. In that regard, the nationwide structure amounts really to abandoning area boundaries and increasing the rates. We must recognize our statement in *Mitchell Energy Corp.* v. *FPC*, 5 Cir. 1975, 519 F.2d 36, 43, that

> [t]he above-ceiling settlement rate was a waiver of the limits of the area rate structure. The relief accorded Mitchell was thus inextricably related to that structure, because Mitchell was thereby insulated from the strictures of the moratorium within that rate structure. As a logical consequence, Mitchell was not affected by subsequent modification of the area rate structure. Mitchell, therefore, remained bound by the terms of its own agreement . . ..

**[7]** A producer may benefit by one procedure, or the other, *but not both. Cf. Moss v. FPC,* 1974, 164 U.S.App. D.C. 1, 502 F.2d 461, 470.

**[8]** In determining whether or not to grant a certificate, benefit to the producer is certainly not the FPC's only consideration. Public interest is always involved and "the Commission, as its guardian, must determine in every proceeding whether the certificate applied for is in the public interest or whether that interest calls for some other disposition". *Panhandle Eastern Pipe Line Co.* v. *FPC,* 3 Cir. 1967, 386 F.2d 607, 610. What public interest will be satisfied by permitting Petitioners to raise the price of flowing gas?

The stated purpose of the higher national rates for new gas was to encourage larger interstate sales and promote further exploration. Petitioners did not appear before the Commission when it held hearings to set the cutoff date; nor have they advanced any cogent arguments as to how ultimate consumers will be benefited in paying higher prices for developed gas supplies already committed to interstate commerce.

**[9]** Petitioners set the 35 cent rate themselves. They sought its approval from the Commission. They obtained



that approval, in final form. They operated under it for two years. A higher price becoming available, the Petitioners wish to erase all that had gone on before. For all the reasons hereinabove set forth, the Commission was within its authority, properly exercised, when it denied the erasure.

Affirmed.

# APPENDIX D

D-1

# UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1975

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No. 75-2327

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YOUR NOS. FPC CI73-545, ET AL
ECEE, INC., ET AL.,

*Petitioners,*

v.

FEDERAL POWER COMMISSION,

*Respondent.*

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before THORNBERRY, COLEMAN and MORGAN,
Circuit Judges.

## JUDGMENT

This cause came on to be heard on the petition of Ecee, Inc., et al. for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this Cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

February 17, 1976

# APPENDIX E

## OPINION NO. 699

(A) *The Commission,* acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84 (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717n, 717o) hereby *orders* that its General Rules Part 2, Subchapter A of Chapter 1, Title 18 of the Code of Federal Regulations, be amended by adding new Section 2.56(h), as follows:

2.56(h) National Rate For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications Of Natural Gas To Interstate Commerce On Or After January 1, 1973

(1) Notwithstanding any other provisions in the General Rules of Practice and Procedure of the Federal Power Commission, or the Regulations Under the Natural Gas Act of the Federal Power Commission, sales of natural gas in interstate commerce made from wells commenced on or after January 1, 1973; or pursuant to contracts executed on or after January 1, 1973, for the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Order No. 491); or pursuant to contracts executed on or after January 1, 1973, where the sales were formerly made pursuant to permanent certificates of unlimited duration under contracts which expired by their own terms on or after January 1, 1973, within the United States may be made at a price not to exceed 42.0 cents per Mcf (at 14.73 psia), exclusive of state production taxes and subject to the adjustments herein provided.

# APPENDIX F

## OPINION NO. 699-H

*The Commission,* acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84 (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. §§ 717c, 717d, 717f, 717g, 717m, 717n, 717o (1970)0, *orders*:

(A) The Statements of General Policy and Interpretations of The Commission, Part 2 of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, are hereby amended by deleting Section 2.56(h) adding a new Section 2.56a as follows:

2.56a National Rate For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications Of Natural Gas To Interstate Commerce On Or After January 1, 1973

(a) *Base National Rate*

(1) Notwithstanding any other provision of the General Rules of the Federal Power Commission, or the Regulations Under the Natural Gas Act, sales of natural gas which qualify under the provisions of one or more of the classifications set forth in paragraph (2) may be made in interstate commerce at a rate not to exceed 50.0 cents per Mcf (at 14.73 psia), exclusive of all State or Federal production, severance or similar taxes, and subject to the adjustments provided in this Section 2.56a.

(2) Sales of natural gas in interstate commerce for resale may be made at the rate prescribed in paragraph (1) of this subsection provided the provisions of one or more of the following classifications apply to such sales:

(i) The sale is made from a well or wells commenced on or after January 1, 1973;

(ii) Sales made pursuant to contracts for the the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce prior to January 1, 1973, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*), or 18 C.F.R. § 2.75(n), where such sales are initiated on or after January 1, 1973, provided that no certificate for the subject sale has been issued under the optional procedure (18 C.F.R. § 2.75).

## APPENDIX G

## OPINION NO. 699-I

*The Commission,* acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84, (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. §§ 717c, 717d, 717f, 717g, 717m, 717n, 717o, (1970)), *orders:*

(A) Section 2.56a(a) (2) (ii) [18 C.F.R. § 2.56a(a) (2) (ii) is amended to read as follows:

(ii) Sales made pursuant to (A) contracts for the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce prior to January 1, 1973, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*); or (B) 18 C.F.R. § 2.75(n), where such sales are initiated on or after January 1, 1973, if the average of the sum of the proposed contract price, periodic escalations, and Btu and tax adjustments is greater than the average of the sum of the base national rate prescribed in section 2.56a(a) (1), the annual escalation prescribed in section 2.56a(a) (3), and the Btu and tax adjustments prescribed in sections 2.56a(c) and 2.56a(b) (1), over the term of the contract submitted for certification pursuant to the optional procedure, provided that no certificate for the subject sale has been issued pursuant to the optional procedure (18 C.F.R. § 2.75).

# APPENDIX H

**Sec. 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas.**

. . . .

n. Upon the filing of an application under this Section, deliveries pursuant to the provisions of the tendered contract may be commenced, pending review of such application by the Commission. Notice of commencement of deliveries shall be given to the Commission within ten days after deliveries first commence, and shall include all pertinent information concerning the deliveries. Any such deliveries so commenced may be terminated (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected. If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed by the Commission, deliveries thereunder shall be terminated. Within thirty days after termination of deliveries, the seller shall notify the Commission of such termination, and shall report the date of termination, volumes delivered, and revenues received.

Supreme Court, U. S.
FILED
JUN 18 1976
MICHAEL RODAK, JR., CLERK

No. 75-1502

# In the Supreme Court of the United States

OCTOBER TERM, 1975

ECEE, INC., ET AL., PETITIONERS

*v.*

FEDERAL POWER COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

DREXEL D. JOURNEY,
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ALLAN ABBOT TUTTLE,
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EDGAR K. PARKS,
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1502

ECEE, INC., ET AL., PETITIONERS

*v.*

FEDERAL POWER COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION**

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1. On December 26, 1972, petitioners filed with the Federal Power Commission applications for certificates of public convenience and necessity authorizing them to sell natural gas from offshore Louisiana to Sea Robin Pipeline Company. Invoking the Commission's "optional procedure" for certificating new producer sales of natural gas (18 C.F.R. 2.75),[1] the applications requested an initial price of 35 cents per Mcf together with fixed escalations of 2.5 cents per Mcf every 36 months for the duration of the 20-year contracts.

The Commission, in September 1973, issued the certificates requested by petitioners and, in November 1973, denied an application for rehearing filed by intervenor

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[1]See *Federal Power Commission* v. *Moss*, No. 74-883, decided March 3, 1976.

American Public Gas Association ("APGA"). APGA filed a petition for review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit.[2]

The Commission thereafter issued an order in an unrelated proceeding establishing a nationwide just and reasonable ceiling rate of 42 cents per Mcf for certain sales of "new" natural gas.[3] Petitioners thereupon filed motions to withdraw their certificates of public convenience and necessity, together with applications to substitute new certificates for sales at the newly established national ceiling rate. Petitioners asserted a right to withdraw their certificates under 18 C.F.R. 2.75(n), which permits the termination of natural gas deliveries that have been commenced after the filing of an application for optional procedure certification if the underlying contract is terminated "prior to the issuance by the Commission of a final order upon review of such application * * *." Petitioners alleged that their contracts with Sea Robin had been terminated and that the Commission's September 1973 order issuing certificates of public convenience and necessity to petitioners was not yet final because it was pending on review before the court of appeals.

The Commission denied the motions and dismissed the applications (Pet. App. A). It concluded that its Septem-

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[2]*American Public Gas Association* v. *Federal Power Commission*, No. 74-1020, filed January 4, 1974, voluntarily dismissed July 24, 1975.

[3]Opinion No. 699, 51 F.P.C. 2212. The Commission thereafter modified its order to increase the rate to 50 cents per Mcf. Opinion No. 699-H, issued December 4, 1974. The national rate orders were affirmed in *Shell Oil Co.* v. *Federal Power Commission*, 520 F. 2d 1061 (C.A. 5), certiorari denied *sub nom. California Co., et al.* v. *Federal Power Commission*, June 14, 1976, Nos. 75-1289, *et al.*



ber 1973 order was final and that petitioners' deliveries under their contracts with Sea Robin were therefore not subject to termination under 18 C.F.R. 2.75(n) (Pet. App. A-3 to A-4). The Commission also concluded that, under the provisions of its national rate orders, petitioners would not be entitled to the national rate even if the optional procedure certificates had not already been issued (*id.* at A-4 to A-5). Finally, the Commission stated that petitioners "have 'taken and enjoyed benefits of the optional procedure and may not [now] renounce the burdens * * *'" (*id.* at A-5).

2. On petition for review, the United States Court of Appeals for the Fifth Circuit affirmed (Pet. App. C). It held that the Commission's issuance of optional procedure certificates was a final order, that the pendency of a petition for review of that order in the court of appeals did not affect the order's finality under 18 C.F.R. 2.75(n), and that petitioners therefore were not entitled to terminate their contracts with Sea Robin and withdraw their certificates.

The court rejected petitioners' contention that "binding them to the certificates as issued is unfair because they never had the opportunity to choose the national rate structure" (Pet. App. C-13). Petitioners sought and received a price for their gas under the optional procedure some 35 percent above the area rate they would otherwise have been required to accept," and "[t]hey collected the higher rate for almost a year before the nationwide schedule was promulgated" (*ibid.*). Although petitioners sought "to erase all that had gone on before" once "[a] higher price [became] available," the court of appeals determined that "the Commission was within its authority, properly exercised, when it denied the erasure" (Pet. App. C-15).

3. Petitioners here renew their contention that they were entitled to withdraw their optional procedure cer-

tificates because the Commission's order issuing the certificates—then under review by a court of appeals on APGA's petition—was not a "final order" within the meaning of 18 C.F.R. 2.75(n). The contention was answered correctly by the court of appeals, which stated (Pet. App. C-10 to C-11; emphasis in original):

> The order of the Commission * * * issuing the certificates finally sanctioned and established the legal relationships among the Petitioners, Sea Robin, and the FPC. The order would not have been reviewable by the Court of Appeals under the terms of the Natural Gas Act had it not done so. 15 U.S.C. §717r(b). The fact that the decision was ripe for judicial review was the "touchstone of finality". *Blanco Oil Co.* v. *FPC*, 1973, 158 U.S. App.D.C. 257, 485 F.2d 1036, 1038.

A *complete* resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final *unless and until* it is stayed, modified, or reversed. This basic concept is further bolstered by the unequivocal language of §717r(c) of the Natural Gas Act that "the commencement of proceedings [for review] . . . shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". In the absence of a stay, the FPC's orders are entitled to have administrative operation and effect during the disposition of the proceedings. *Jupiter Corp.* v. *FPC*, 1969, 137 U.S. App.D.C. 295, 424 F.2d 783, 791.

We must interpret the word "final" as the parties must have understood it at the time they entered into the agreement *within the framework of the Natural Gas Act. Mitchell Energy Corp.* v. *FPC*, 5 Cir. 1975, 519 F.2d 36, 41; *Texas Eastern Transmission Corp.* v. *FPC*, 5 Cir. 1962, 306 F.2d 345, 347. The



> previously noted provisions of the Act all lead to the inescapable conclusion that Congress intended and the parties must have understood the Commission's action to be its final disposition of the matter.[4]

Petitioners argue that the District of Columbia Circuit might have set aside the Commission's final order on APGA's petition for review and that they might thereafter have had a right to terminate deliveries (Pet. 6). But it does not follow that petitioners had the same right *pending* judicial review. The possibility that a Commission order will be set aside does not make it any the less final for purposes of 18 C.F.R. 2.75(n).

In any event, petitioners would not have been entitled to the national rate even if they could properly have withdrawn their optional procedure certificates. The Commission made clear in Opinion No. 699-I (quoted at Pet. App. B-3) that it "did not intend that those producers [who had filed for certificates pursuant to the optional procedure] would be permitted to receive the national rate where such rate is more beneficial to the producer than the rate which was sought under the optional procedur[e] and where deliveries have commenced pursuant to the optional procedure."

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[4]The court noted that, under 18 C.F.R. 2.75(*l*), "[a] final order of this Commission, issuing a certificate as applied for, * * * shall constitute a final determination that the rates, charges and services, therein specified are just, reasonable, and required by the present and future public convenience and necessity."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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